

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of )

Annual Assessment of the Status of )  
Competition in Markets for the )  
Delivery of Video Programming )

To: The Commission )

CS Docket No. 97-141

REPLY COMMENTS  
OF  
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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## TABLE OF CONTENTS

<b>I.</b>	<b>SUMMARY .....</b>	<b>1</b>
<b>II.</b>	<b>REPLY COMMENTS .....</b>	<b>3</b>
<b>A.</b>	<b>The FCC Should Award Damages for Violations of the Program Access Rules .....</b>	<b>3</b>
<b>B.</b>	<b>The Copyright Law Should be Amended to Allow for the Nationwide Retransmission of Network Signals by Satellite With Payment of a Surcharge for Subscribers Located Within 35 Miles of an Affiliate .....</b>	<b>6</b>
<b>C.</b>	<b>Restrictive Local DBS Zoning Ordinances Must be Preempted .....</b>	<b>12</b>
<b>D.</b>	<b>The Current Statutory Exemption for Electric Cooperatives from Federal Pole Attachment Regulation Should be Maintained .....</b>	<b>13</b>
<b>E.</b>	<b>Excessive Public Interest Obligations Will Thwart the Growth of a Still Nascent DBS Industry .....</b>	<b>16</b>
<b>F.</b>	<b>The Proposed Merger Between NewsCorp and PrimeStar Will Thwart Competition .....</b>	<b>18</b>
<b>G.</b>	<b>The Program Access Rules Should be Expanded to Cover Non- Vertically-Integrated Programmers and Terrestrially-Delivered Programming .....</b>	<b>20</b>
<b>III.</b>	<b>CONCLUSION .....</b>	<b>24</b>

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THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

Pursuant to Section 1.430 of the Commission's Rules and Regulations, the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Reply Comments in response to the Comments filed in the above-captioned proceeding.<sup>1/</sup> NRTC appreciates the opportunity to join those parties urging the Commission to foster an environment where Multichannel Video Programming Distributors ("MVPDs") can compete more effectively against cable.<sup>2/</sup>

**I. SUMMARY**

NRTC and its members are MVPDs serving 600,000 rural households via satellite. As an MVPD competing with cable for more than 10 years, NRTC finds that several aspects of the Commission's rules and policies do not effectively promote

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<sup>1/</sup> Notice of Inquiry, 62 Fed. Reg. 38088 (released July 16, 1997) ("NOI").

<sup>2/</sup> NRTC filed Comments in this proceeding on July 23, 1997.

competition in the video delivery market. Despite progress by DBS in recent years, cable remains by far the dominant means of video delivery and will maintain its monopoly stronghold until the Commission takes more aggressive action to promote competition.

Accordingly, NRTC submits these Reply Comments urging the Commission:

- **To impose damages for violations of the Commission's program access rules.**
- **To recommend that Congress remove the current statutory restriction on satellite carriers' retransmission of network signals, and allow the nationwide distribution of network signals by satellite with payment of a surcharge for subscribers located within 35 miles of an affiliate.**
- **To continue applying the Commission's preemption policy to local and private covenants restricting the installation of DBS dishes, and to extend it to restrictions on the use of DBS dishes by renters.**
- **To recommend to Congress the continuation of the current exemption from Federal pole attachment regulations for electric cooperatives.**
- **To provide DBS with maximum flexibility in implementing its new public service obligations.**
- **To deny PrimeStar/NewsCorp's expected request for transfer of control of the 110 degree orbital slot unless adequate competitive assurances are provided.**
- **To expand its program access rules to cover (1) programming controlled by non-vertically-integrated programmers with significant market power, and (2) vertically-integrated programmers retransmitting programming through terrestrial means.**

## II. REPLY COMMENTS

### A. The FCC Should Award Damages for Violations of the Program Access Rules.

1. In its Comments in this proceeding, NRTC urged the Commission to finally step forward and exercise its authority to award damages to MVPDs aggrieved by a program vendor's illegal pricing practices. NRTC noted that Congress adopted the program access provisions because competitors to cable needed to obtain access to programming to provide a viable multichannel alternative to the American public. The Commission was charged by Congress with developing rules to prohibit unlawful price discrimination and was given broad statutory authority to order "appropriate remedies" for violations of what would be the Commission's program access rules. 47 U.S.C. § 628(e)(1).

2. The discriminatory pricing practices and unfair methods of competition which led to the promulgation of the program access rules remain in existence today. Ameritech, an MVPD providing video services under Title VI of the Communication Act, noted in its Comments that violations of the program access rules and anticompetitive business practices have continued to date because of the Commission's "folly of not imposing fines or awarding damages for violation[s]" of the program access

rules.<sup>3/</sup> Ameritech alerted the Commission to the continued anticompetitive practices of certain programmers charging discriminatory rates and engaging in unfair business practices.<sup>4/</sup>

3. Ameritech has filed a formal Program Access complaint against certain programmers. Based on the experience of other MVPDs (including NRTC) who have pursued complaints, however, Ameritech is not optimistic. Under the Commission's current rules and policies, even a successful outcome in the complaint proceeding would not guarantee the payment of damages or prevent the offending programmers from continuing their anticompetitive behavior.

4. Ameritech noted that even after the Commission's July 10, 1997 ruling that Cablevision/Rainbow violated the program access rules in dealing with Bell Atlantic/NYNEX (another MVPD in competition with cable), Bell Atlantic/NYNEX were not the real victors.<sup>5/</sup> Despite their victory, Bell Atlantic/NYNEX felt that "Rainbow emerged the winner from a business perspective because it has delayed Bell Atlantic in offering attractive programming and has suffered no financial penalty for its obstructionist and anticompetitive tactics."<sup>6/</sup> Similarly, Bell Atlantic/NYNEX noted in

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<sup>3/</sup> Ameritech Comments at p. 28.

<sup>4/</sup> Id. at p. 27.

<sup>5/</sup> Id. at pp. 26-27.

<sup>6/</sup> Id.

their Comments that “to the extent that Rainbow finds it in its own interest to deny programming to competitors of incumbent cable operators, it comes out ahead even though it was found to have violated the rules.”<sup>7/</sup> Under its current rules and policies, the Commission merely requires offenders to comply prospectively with the law. As Ameritech noted, “[t]he absence of concrete, economic disincentives is an invitation to repeat the offending, anticompetitive behavior.”<sup>8/</sup>

5. NRTC agrees with Bell Atlantic/NYNEX and Ameritech that the Commission at long last should establish and award damages for violations of its program access rules. As described in NRTC’s Comments, program access has been a continuing problem for satellite distributors. NRTC has repeatedly pleaded with the Commission to address the problem in a meaningful way by imposing appropriate damages for violations of the program access rules.

6. At this point, the cable industry’s discriminatory pricing practices and the lack of an adequate regulatory response by the Commission are no longer just satellite program distribution problems. As demonstrated by the Comments in this proceeding, it

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<sup>7/</sup> Bell Atlantic/NYNEX Comments at 3.

<sup>8/</sup> Ameritech Comments at 28.

is clear that the Commission's failure to impose damages for program access violations has substantially delayed the ability of MVPDs across-the-board to compete effectively with cable.

**B. The Copyright Law Should be Amended to Allow for the Nationwide Retransmission of Network Signals by Satellite With Payment of a Surcharge for Subscribers Located Within 35 Miles of an Affiliate.**

7. Current copyright restrictions have substantially impaired the ability of DBS to break cable's stronghold on the video delivery market. As explained in NRTC's Comments in this proceeding, the Satellite Home Viewer Act ("SHVA") permits only "unserved households" to lawfully receive signals of network stations retransmitted for private home viewing via DBS.<sup>9/</sup> An "unserved household" is defined as one that cannot receive a signal of Grade B intensity from a local network station through the use of a conventional rooftop antenna, and has not received the local network affiliate through a subscription to cable services within the previous 90 days.<sup>10/</sup>

8. NRTC agrees with SBCA that this restriction on the retransmission of network signals has created vast uncertainty in the satellite industry. PrimeTime 24 has characterized this shortcoming in the copyright law as an "impediment" which "severely

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<sup>9/</sup> NRTC Comments at p. 12.

<sup>10/</sup> 17 U.S.C. § 119(a)(2).



undermine[s] the long-term ability of DirecTV, EchoStar and others in the satellite industry to challenge the hegemony of cable."<sup>11/</sup>

9. NRTC also agrees with DIRECTV and PrimeTime 24 that the inability of DBS providers to offer network services to a significant sector of television households places DBS at an immense competitive disadvantage to cable.<sup>12/</sup> According to research done by DIRECTV, "a significant number of people shopping for a DBS system respond that the ability to receive local broadcast channels is *very important*."<sup>13/</sup> Similarly, PrimeTime 24 emphasized the importance of network programming as an integral part of a competitive television market and stated that, "if satellites can't provide the highest rated shows on television, cable will maintain that satellite is offering a seriously defective product."<sup>14/</sup>

10. SBCA discusses another competitive disadvantage faced by DBS providers as a result of the use of the Grade B signal strength eligibility standard. As noted by SBCA, a 1994 amendment to the SHVA, which expired on December 31, 1996, granted broadcasters the right to challenge the eligibility of satellite subscribers within their service area. A field test was performed at the challenged household to determine

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<sup>11/</sup> PrimeTime 24 Comments at p. 2.

<sup>12/</sup> See DIRECTV Comments at p. 8; PrimeTime 24 Comments at p. 2.

<sup>13/</sup> DIRECTV Comments at p. 8.

<sup>14/</sup> PrimeTime 24 at p. 2.

whether or not that household received a signal of Grade B strength and was therefore not eligible for the programming. If the household was found to receive a signal of Grade B intensity, a waiver from the local affiliate had to be obtained or the satellite provider had to terminate the household's network service. Not only was the measurement process costly for the DBS service provider who paid for the testing if the household was found to receive a Grade B signal, but the customers which DBS service providers were forced to terminate became dissatisfied and angered with the DBS provider. SBCA reports that more than one million households were challenged, and a significant number had their network service discontinued as a result, often after having received network service by satellite for many months.<sup>15/</sup> Since the signal measurement provision expired at the end of 1996, broadcasters who believe they are aggrieved can challenge the DBS provider in court by filing an infringement suit. The economic burden for the satellite industry to "challenge these challenges" and the subscriber ill will resulting from the termination of network services add to the competitive disadvantages that the SHVA has created for DBS providers.

11. On August 1, 1997, at the request of Senator Orrin Hatch, the Copyright Office issued its Report to Congress entitled, "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals." The Copyright Office

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<sup>15/</sup> SBCA Comments at p. 22.

determined that the satellite compulsory license should be extended with no sunset.<sup>16/</sup>

Furthermore, the Copyright Office found that the network retransmission restrictions are modeled after the FCC's network nonduplication rules that apply to cable and should be governed by communications, not copyright, law.<sup>17/</sup> As a communications issue, the Copyright Office recommended that Congress amend the Communications Act of 1934 to provide, or direct the FCC to adopt, network exclusivity protection for satellite retransmissions of broadcast signals.<sup>18/</sup> If Congress declines to direct the FCC to adopt network exclusivity protection for satellite retransmission of broadcast signals, the Copyright Office admitted that it would be faced with "a problematic issue with few immediate solutions."<sup>19/</sup>

12. The most problematic issue, according to the Copyright Office, is that "the Grade B standard (is) less than precise and cost inefficient when applied to individual household determinations."<sup>20/</sup> The Copyright Office determined that it would adopt an interim approach until satellite carriers implement local retransmission of network signals, or over-the-air digital television becomes a widespread medium and offers a clear

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<sup>16/</sup> A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, U.S. Copyright Office, released August 1, 1997, p. 137. ("CRO Report").

<sup>17/</sup> Id. at p. 118.

<sup>18/</sup> Id.

<sup>19/</sup> Id. at p. xv.

<sup>20/</sup> Id. at p. xv.

standard for determining when a subscriber receives over the air a network signal with good picture quality.<sup>21/</sup> The Copyright Office's interim approach would allow a satellite carrier to retransmit network signals to all subscribers, but those living in a "red zone" (the local affiliate's local market defined by its ADI) would have to pay a surcharge to the Copyright Office for distribution to the affiliates.<sup>22/</sup>

13. NRTC supports the extension of the satellite compulsory license and the nationwide availability of network signals through satellite carriers. NRTC opposes the Copyright Office's interim approach, however, to the extent that local markets are defined as the affiliate's ADI. As NRTC's Reply Comments to the Copyright Office emphasized, the Congressional purpose in establishing the network retransmission restriction was to protect the network/affiliate relationship. An affiliate's area of network exclusivity is defined by the provisions of its Network Affiliation Agreement, and most agreements grant exclusivity to the affiliate only for the affiliate's "market," its "community of license" or its "licensed community," not the ADI or Grade B signal strength.<sup>23/</sup> As the Copyright Office noted in its Report, the area in which a local network affiliate is entitled to nonduplication protection under the FCC's rules is defined in its programming contract with the network, and in no case can the protection exceed an area

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<sup>21/</sup> Id. at p. 125.

<sup>22/</sup> Id.

<sup>23/</sup> NRTC Reply Comments in Copyright Office Proceeding, Docket No. 97-1 at p. 7.

more than 35 miles from the broadcast station.<sup>24/</sup>

14. In recognition of the affiliate's geographic area of exclusivity, NRTC proposed to the Copyright Office that the copyright law be amended to allow for the nationwide retransmission of network signals by satellite, coupled with the payment of a surcharge for subscribers located within 35 miles of any affiliate. Other than to say that "ADIs are separated from one another by community lines, and thus would eliminate the problem of overlapping,"<sup>25/</sup> the Copyright Office offered no explanation in its Report as to why it chose ADI over NRTC's proposed 35-mile zone as the basis for the surcharge. The overlap issue, however, is no impediment to adoption of a more accurate and realistic 35-mile zone. As NRTC suggested in its Reply Comments to the Copyright Office, any surcharge simply could be "split" between affiliates with overlapping 35-mile zones.<sup>26/</sup>

15. While the Copyright Office recognized that the Congressional objective in the SHVA was to protect the network/affiliate relationship, its proposed solution to substitute a station's ADI for the Grade B signal intensity standard provides a much broader area of exclusivity for affiliates than is warranted. The ADI is far larger than the

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<sup>24/</sup> The Copyright Office recognized that Congress used the Grade B standard as a "surrogate for the network nonduplication rules of the FCC applicable to the cable industry." CRO Report, p. 104.

<sup>25/</sup> Id. at p. 120.

<sup>26/</sup> NRTC Reply Comments in Copyright Office Proceeding at p. 11, note 9.

affiliate's actual area of exclusivity and should not form the basis for the surcharge. The Commission should recommend that Congress allow the nationwide distribution of network signals by satellite, coupled with the payment of a surcharge to the affiliates based on a 35-mile zone of exclusivity.

**C. Restrictive Local DBS Zoning Ordinances Must be Preempted.**

16. The Commission has made progress in meeting the Congressional mandate of the 1996 Telecommunications Act -- promoting competition -- with respect to preemption of local ordinances that impair access to over-the-air reception devices. In its first ruling concerning restrictions on the placement of DBS dishes, the Commission recently held that the City of Meade, Kansas' dual requirements of a \$5.00 permit fee and prior City approval unreasonably delayed or prevented DBS antenna installation, maintenance or use and were not required by safety or historic preservation considerations.<sup>27/</sup> NRTC supports the Commission's decision in the Meade case and urges the Commission to continue to exercise its authority to preempt state and local laws impairing the installation, maintenance or use of DBS dishes.

17. The Commission still has not determined whether to extend its preemption policy to renters and those that do not have exclusive use of areas suitable for antenna installation. NRTC agrees with DIRECTV that as a consequence of the Commission's

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<sup>27/</sup> Star Lambert and Satellite Broadcasting and Communications Association of America, CSR 4913-O, Memorandum Opinion and Order, July 22, 1997.

failure to extend its preemption policy, “residents of MDUs have not experienced the benefits of competitive DBS services to the same extent as residents of single family dwellings.”<sup>28/</sup> This bifurcated Commission preemption policy is fundamentally unfair to the significant number of consumers who rent or do not have exclusive control of property suitable for antenna installation.

18. The inability of DBS to provide services to consumers living in MDUs with restrictive covenants places DBS at a competitive disadvantage to cable and other MVPDs. NRTC agrees with SBCA that Congress made it clear that all “viewers,” regardless of whether they own property, should be protected from regulations impairing their ability to receive video programming through an over-the-air receiving device.<sup>29/</sup> To that end, NRTC joins SBCA and DIRECTV in urging the Commission to exercise its preemption authority over the installation, maintenance and use of DBS dishes in MDUs.

**D. The Current Statutory Exemption for Electric Cooperatives from Federal Pole Attachment Regulation Should be Maintained.**

19. NRTC, the American Public Power Association, NRECA, UTC, and a number of individual cooperatives filed Comments in this proceeding urging the

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<sup>28/</sup> DIRECTV Comments at p. 10.

<sup>29/</sup> SBCA Comments at p. 12, citing to Section 207 of the 1996 Telecommunications Act.

Commission not to impose federal pole attachment regulations on electric cooperatives.<sup>30/</sup>

On the other hand, the National Cable Television Association and the Small Cable Business Association ("SCBA") urged the Commission to eliminate the existing statutory exemption for electric cooperatives.<sup>31/</sup> NCTA claimed that cooperatives are overcharging cable operators because the cooperatives are members of NRTC and distribute DBS in competition with cable operators.<sup>32/</sup>

20. NRTC urges the Commission not to recommend federal pole attachment regulation of electric cooperatives. In the vast majority of cases, the rates charged by electric cooperatives to attaching entities do not even recover the attacher's proportionate share of the full cost of the pole. NRECA explained in its Comments that it would be a "zero-sum game" for an electric cooperative to overcharge an attaching entity for access to the electric cooperative's poles.<sup>33/</sup> Under the cooperative system, the electric cooperative's members own the cooperative. As such, they would be the same people taking service from the telephone company or cable company attaching to the

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<sup>30/</sup> See American Public Power Association Comments; Clay Electric Cooperative, Inc. Comments; Florida Electric Cooperatives Association, Inc.; Jackson Electric Membership Corporation Comments; Little Ocmulgee Electric Membership Corporation Comments; Minnesota Rural Electric Association Comments; Montana Electric Cooperatives' Association Comments; the National Rural Electric Cooperative Association Comments; Nebraska Rural Electric Association Comments; UTC Comments; Wisconsin Federation of Cooperatives Comments.

<sup>31/</sup> NCTA Comments at pp. 41-42, 46; SCBA Comments at pp. 21-23.

<sup>32/</sup> Id.

<sup>33/</sup> NRECA Comments at p.2.



cooperative's poles. They would be paying the pole attachment rates as customers of another provider. NRECA reasoned that no electric cooperative would artificially inflate pole attachment rates that its members would eventually be obligated to pay.<sup>34/</sup> As a result, as NRECA and NRTC pointed out, the cooperative structure is self-regulating for purposes of pole attachment agreements.<sup>35/</sup>

21. The Comments of the other cooperatives reflect NRECA's and NRTC's position that electric cooperatives, by their very nature, charge fair pole attachment rates and should not be subject to the federal pole attachment regulations. The Nebraska Rural Electric Association ("NREA") noted that it was not aware of any cases where "pole attachment rates could not be amicably agreed upon by private negotiation between the contractual parties."<sup>36/</sup> Furthermore, NREA added that "[e]lectric distribution cooperatives are by their nature rural consumer oriented, and therefore unlikely to do anything to impede the delivery of telecommunications and cable services to their sometimes technologically-hindered remote rural customers."<sup>37/</sup> The American Public Power Association noted that elimination of the cooperative and municipality exemption would be especially harmful to the rural electric utilities, because they "generally lack the resources to and data bases necessary to comply with the Commission's highly complex

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<sup>34/</sup> Id.

<sup>35/</sup> Id.

<sup>36/</sup> NREA Comments at p. 2.

<sup>37/</sup> Id.

pole-attachment requirements.”<sup>38/</sup>

22. NRTC agrees with those parties urging the Commission to maintain the exemption from federal pole attachment regulations for electric cooperatives. Federal pole attachment regulations are not necessary to ensure that electric cooperatives are charging fair pole attachment fees. Any individual cases of abuse by electric cooperatives can be handled under the existing antitrust laws, without the unnecessary expense and administrative burdens incident to complying with federal pole attachment regulations.

**E. Excessive Public Interest Obligations Will Thwart the Growth of a Still Nascent DBS Industry.**

23. The SCBA and the Alliance for Community Media (“Alliance”) requested that the Commission impose significant new obligations on DBS in furtherance of the Commission’s mandate to impose public service requirements on DBS providers.<sup>39/</sup> SCBA calls for the Commission to impose must-carry obligations on DBS providers or to otherwise mandate that DBS providers contribute to a fund in each community to support local programming providers.<sup>40/</sup> The Alliance calls for the Commission to impose public service obligations on DBS providers equivalent to PEG programming and to require

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<sup>38/</sup> American Public Power Association Comment at p. 2.

<sup>39/</sup> SCBA Comments at p. 4; Alliance Comments at p. 5.

<sup>40/</sup> SCBA Comments at pp. 4-5.

DBS providers to provide technical assistance to governmental access and wiring of schools for the Internet.<sup>41/</sup>

24. NRTC agrees with the SBCA that the public service obligations placed on DBS must reflect the fact that DBS is a national subscription service, which does not have a local presence like cable and broadcasting.<sup>42/</sup> To that end, NRTC joins SBCA in urging the Commission to allow DBS providers broad flexibility in meeting any new public service obligations. Must-carry, PEG programming and local government access requirements are local in nature and are appropriate for cable which has a local presence and utilizes local public rights-of-way. However, they are inappropriate for a national service such as DBS which at present does not even retransmit local programming. DBS providers should be permitted to fulfill their public service obligations with an array of appropriate national programming, including original programming such as "Channel Earth," a unique offering developed by NRTC and others specifically for rural America.

25. Despite its growth in subscribers, DBS is still a nascent industry. The Commission should be cautious that it does not impose, in the name of the public interest, unnecessary requirements on DBS which would reduce its ability to compete effectively against cable.

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<sup>41/</sup> Alliance Comments at p. 5.

<sup>42/</sup> SBCA Comments at p. 13.

**F. The Proposed Merger Between NewsCorp and PrimeStar Will Thwart Competition.**

26. DIRECTV and EchoStar submitted Comments in this proceeding alerting the Commission to the devastating consequences to competition resulting from the proposed alliance between NewsCorp and PrimeStar, a partnership comprised of the nation's largest cable companies.<sup>43/</sup> NRTC agrees with DIRECTV and EchoStar that the proposed alliance would strengthen cable's dominance and lead to anticompetitive harm to the MVPD industry.

27. Based on PrimeStar's reported statement that only 10% of the homes served by its current mid-power DBS service are passed by cable, EchoStar believes that PrimeStar has chosen not to compete for cable subscribers but instead targets only non-cable consumers.<sup>44/</sup> Under the proposed merger, PrimeStar apparently would acquire 11 channels at the 119-degree slot from TEMPO and 28 channels at the 110-degree slot that are currently licensed to MCI and controlled by NewsCorp. There is no indication that if the Commission were to permit PrimeStar to acquire these channels, PrimeStar would change its cable-friendly business plan. NRTC agrees with DIRECTV that PrimeStar "simply [would] use the national distribution capabilities of high-power DBS to complement, rather than compete with, cable service."<sup>45/</sup>

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<sup>43/</sup> See DIRECTV Comments at p. 3; Echostar Comments at p. 13.

<sup>44/</sup> EchoStar Comments at pp. 7-8, note 8.

<sup>45/</sup> DIRECTV Comments at p. 3.

28. NRTC reminds the Commission that just one year ago, the FCC effectively precluded DIRECTV from acquiring the 110-degree DBS orbital location when it was auctioned. At the heart of the controversy was the Commission's decision to prohibit entities with an attributable interest in channels at one full-CONUS location from acquiring the channels being auctioned at the 110 degree slot unless that entity divested its existing interests at other full-CONUS locations within a certain period of time. The practical effect, of course, was to prevent DIRECTV from participating in the auction. The Commission's bidding qualifications were based on the theory that a DBS provider with channels at two full-CONUS locations could reduce the extent of competition among DBS providers.<sup>46/</sup> Cable-affiliated companies were permitted to apply for the DBS slot.

29. The Commission's concern regarding the potential adverse impact of DIRECTV's acquisition of the 110-degree slot should be even more applicable to the NewsCorp/PrimeStar merger, since PrimeStar has already petitioned the Commission for control of the 119-degree full CONUS DBS orbital slot where TEMPO Satellite, Inc. is currently licensed for 11 channels. No substantial changes have occurred in the DBS market since the Commission's decision last year to restrict eligibility in the 110-degree auction. Both fundamental fairness and public policy dictate that the Commission should not allow the merged PrimeStar entity to control two full CONUS location when

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<sup>46/</sup> Revision of the Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, 11 FCC Rcd 9712 at ¶ 29.

just last year the Commission determined that control of two full CONUS locations by any entity (let alone a powerhouse cable consortium) would be anticompetitive.

30. NRTC believes that a cable-affiliated DBS operator with substantial market power will protect its monopoly profits in the cable business first and foremost, by attempting to prevent DBS from seriously competing with cable. At a minimum, NRTC urges the Commission to carefully scrutinize the anticompetitive impact of the proposed merger and to reject the PrimeStar/NewsCorp requests until both entities provide the Commission with concrete and measurable assurances that the new entity will not use its concentration of media power to squelch the competitive impact of DBS by denying access to programming it controls.

**G. The Program Access Rules Should be Expanded to Cover Non-Vertically-Integrated Programmers and Terrestrially-Delivered Programming.**

31. The Commission's current program access rules prohibit cable operators and vertically-integrated satellite cable programmers from denying MVPDs access to programming. As DIRECTV explained in its Comments, however, it is uncertain whether the merged NewsCorp/PrimeStar entity would be considered vertically-integrated under the Commission's current rules.<sup>47/</sup> Without program access requirements, NewsCorp could easily prevent PrimeStar's competitors from distributing its popular

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<sup>47/</sup> Id. at pp. 4-5.

program offerings (e.g., all Fox Broadcasting programming).<sup>48/</sup> In light of the media ownership and programming concentration concerns raised by the proposed PrimeStar/NewsCorp merger, NRTC agrees with DIRECTV when it urges the Commission to expand the scope of the program access rules to encompass non-vertically-integrated programmers with substantial market power.<sup>49/</sup>

32. The Wireless Cable Association International ("WCAI") also requested that the present definition of "vertical integration" be re-evaluated."<sup>50/</sup> WCAI asked the Commission to consider the joint ventures between programmers not traditionally considered to be vertically-integrated (e.g. Fox and Microsoft) with highly vertically-integrated cable operators (e.g. TCI, Time Warner, Comcast, Continental/US West, and Cablevision).<sup>51/</sup> WCAI noted that in light of these types of joint ventures, "the present definition of 'vertical integration' is too narrow to encompass the broad variety of business relationships within the cable industry that clearly threaten the availability of programming to cable's competitors."<sup>52/</sup> Furthermore, WCAI noted that the more notable cable programming services introduced this year, such as Fox News and fX by NewsCorp and MSNBC by Microsoft and NBC, are owned by entities that would not be viewed as

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<sup>48/</sup> Id. at p. 5.

<sup>49/</sup> DIRECTV Comments at p. 6.

<sup>50/</sup> WCAI Comments at p. 10.

<sup>51/</sup> Id.

<sup>52/</sup> Id.

“vertically integrated” under the program access rules. WCAI asserts that as a result of these affiliations, wireless cable companies have trouble securing affiliation agreements with those same programming services.<sup>53/</sup>

33. Similarly, BellSouth reported that as a wireless cable provider, it was experiencing difficulties obtaining programming such as Fox News, fX and MSNBC from those companies which represent a huge concentration of media power but are not necessarily considered “vertically integrated.”<sup>54/</sup> In its 1996 Competition Report, the Commission recognized that denial of access to programming from non-vertically-integrated programmers “may inhibit competition in markets for the distribution of video programming.”<sup>55/</sup>

34. NRTC agrees with these other Commenters that in light of the looming media mergers, it is time for the Commission to reexamine its definition of “vertically integrated.” The scope of its program access rules should be broadened to encompass non-vertically-integrated programmers that wield substantial market power.

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<sup>53/</sup> Id. at p. 10.

<sup>54/</sup> BellSouth Comments at p. 12.

<sup>55/</sup> 1996 Competition Report at ¶ 157.



35. Another shortcoming of the program access rules in guarding against anticompetitive behavior is that they currently apply only to satellite-delivered programming. The Commission recognized in its 1996 Competition Report, however, that as fiber-optic wiring becomes cheaper and easier to deploy “delivery of programming by terrestrial means instead of via satellite may permit cable operators to abuse vertical relationships between themselves and programmers.”<sup>56/</sup> The Commission took no further steps in reviewing this loophole in the program access rules, because it determined that it did not have actual evidence that such conduct was occurring.<sup>57/</sup>

36. In their Comments in this proceeding, several parties noted that there is no longer a need for the Commission to speculate about whether vertically-integrated cable programmers will evade the program access rules by delivering their video programming through fiber-optic wiring rather than via satellite.<sup>58/</sup> WCAI, Bell Atlantic, BellSouth and Ameritech all noted reports that Cablevision Systems Corp., which controls the rights to virtually all major sports programming in the New York Metropolitan area, will soon migrate its popular SportsChannel New York service from satellite distribution to fiber with the express purpose of evading its program access obligations to competing DBS

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<sup>56/</sup> 1996 Competition Report at ¶ 153.

<sup>57/</sup> Id. at ¶ 154.

<sup>58/</sup> See WCAI Comments at p. 7; Ameritech Comments at p. 19; BellSouth Comments at p. 15; Bell Atlantic and NYNEX Comments at p. 6.